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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 515

WORTHINGTON CORPORATION,

Appellant,

against

THOMAS MLODOZENIEC, SPECIAL DISABILITY FUND under Workmen's Compensation Law, Section 15, subdivision 8, and WORKMEN'S COMPENSATION BOARD,

Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM ON BEHALF OF WORKMEN'S COMPENSATION BOARD

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WORTHINGTON CORPORATION,

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THOMAS MLODOZENIEC, SPECIAL DISABILITY FUND under Workmen's Compensation Law, Section 15, subdivision 8, and WORKMEN'S COMPENSATION BOARD,

Appellees.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM ON BEHALF OF WORKMEN'S COMPENSATION BOARD

Appellee, Workmen's Compensation Board, moves that the appeal herein be dismissed, or in the alternative that the order appealed from be affirmed.

Challenged Statute and Proceedings Below

Appellant challenges the constitutionality of the application of New York State Workmen's Compensation Law § 44-a, as amended by L. 1957, ch. 938, effective July 1, 1957, to a claim by Thomas Mlodozeniec, the claimant-appellee, for disability compensation for the period from August 1, 1953 to July 19, 1956, prior to the effective date of the amendment (Jurisdictional Statement, pp. 3, 4).

Prior to July 1, 1957, the provisions of Workmen's Compensation Law § 44-a read as follows:

"§ 44-a. *Liability of employer; silicosis or other dust diseases.* The employer in whose employment an employee was last exposed to an injurious dust hazard shall be liable for the payments required by this chapter when disability or death of the employee shall be due to silicosis or other dust diseases. Nothwithstanding the provisions of section forty of this chapter the employer shall be liable for the payments prescribed by this chapter when such disability results within two years after the last injurious exposure as defined in section forty-seven; or when death results at any time from such injurious exposure."

Section 44-a was amended by L. 1957, ch. 938, effective July 1, 1957. The amendment merely added, at the end of the section, a clause reading as follows:

"* * * *or where the employee while continuously employed by the same employer is transferred from an injurious exposure to a non-injurious exposure and disablement occurs at any time during such employment with the same employer, or within two years after termination of such employment;* or when death results at any time from such injurious exposure." (Italics indicate new matter)

Thomas Mlódozeniec was employed by the appellant as a chipper and grinder from September 22, 1930 to July 1, 1946. During all that time, he was exposed to silica dust in his employment. On the latter date, he was transferred to the employer's machine shop where he no longer came in contact with silica dust.

On August 1, 1953, Mlodozeniec became permanently totally disabled as a result of silico-tuberculosis due to the exposure to silica dust in his employment with the appellant. He accordingly filed a claim for compensation

with the New York Workmen's Compensation Board for the disability which he had sustained. On May 25, 1955, the Workmen's Compensation Board Referee disallowed the claim on the ground that Mlodozeniec's disability commenced on August 1, 1953, more than 2 years after July 1, 1946, the date of his last injurious exposure to silica dust (fols. 76-83).

On Mlodozeniec's application to review the determination of the Referee (fols. 130-134), the Panel of the Workmen's Compensation Board on December 14, 1955, reversed the decision of the Referee, and held that the continuity of the employment by Mlodozeniec with the same employer from the time of contracting the silico-tuberculosis until the date of disablement was sufficient to waive the time limitations of Workmen's Compensation Law, §§ 40 and 44-a (Appendix A). The Panel directed that the case be restored to the Referee's calendar for the development of the record on other issues (fols. 91-96).

On December 23, 1955, the New York Supreme Court, Appellate Division, Third Department, held in a case similar to the case herein (*Matter of Gajewski* v. *American Radiator & Standard Sanitary Corporation*, 1 A. D. 2d 81), that compensation is not payable to employees who became disabled more than 2 years after their last injurious exposure to silica dust, even though they continued to be employed by the same employer in non-injurious exposure jobs up to the date of the disability.

On August 6, 1956, between the date of the decision of the Appellate Division in the *Gajewski* case and the affirmance of the order of that Court by the New York Court of Appeals on April 12, 1957 (2 N. Y. 2d 1007), the Workmen's Compensation Board Referee made an award to Mlodozeniec for disability compensation covering the period from August 1, 1953 to July 19, 1956 (fols. 97-104).

Following the decision of the Courts in the *Gajewski* case, the New York Joint Legislative Committee on Industrial and Labor Conditions, in 1957, made a report to the

Legislature on the seriousness of the problem created by the decision (N. Y. Leg. Ann., 1957, p. 303; Appendix B). The report pointed out that until the decision of the New York Supreme Court, Appellate Division, Third Department, in the *Gajewski* case, it was believed generally that the exception contained in Workmen's Compensation Law, § 40 (Appendix A), which exempted employees who contracted the disease in the same employment with the same employer by whom he was employed at the time of his disablement and who had continued in the same employment with the same employer from the time of contracting the disease up to the time of his disablement, applied to workmen who contracted silicosis in their employments. In the report it was recommended by the Joint Legislative Committee that Workmen's Compensation Law, § 44-a, be amended by incorporating an exception similar to that contained in § 40. L. 1957, Ch. 938 carries out the recommendation contained in the report.

Meanwhile, the instant case still was pending and was on appeal to the Appellate Division, Third Department. On June 6, 1958, the Workmen's Compensation Board held that the 1957 amendment to § 44-a, applied to all cases open and pending on July 1, 1957, the effective date of the amendment (fols. 121-126).

On August 13, 1959, the New York Supreme Court, Appellate Division, Third Department, affirmed the decision of the Workmen's Compensation Board (9 A. D. 2d 21; fols. 169-183). The Court of Appeals affirmed the order of the Appellate Division without opinion (8 N. Y. 2d 918 [1960]).

A motion was made by the appellant in the Court of Appeals for reargument of the appeal or in the alternative for an amendment of the remittitur. The motion for reargument was denied (8 N. Y. 1011 [1960]). The motion for the amendment of the remittitur was granted (8 N. Y. 1012 [1960]). The remittitur was amended to state that

upon the appeal there was presented and necessarily passed upon a question under the Constitution of the United States; that the appellant contended that the right to due process of law and equal protection of the laws under the Fourteenth Amendment of the Constitution were denied and that the Court of Appeals held that there was no such deprivation or denial.

It is from the order of the New York Court of Appeals that the appellant appeals to this Court.

ARGUMENT

No substantial federal question is presented in the jurisdictional statement of the appellant.

The constitutional attack by the appellant is directed to the application of New York State Workmen's Compensation Law § 44-a. That statute imposes liability upon employers for disability resulting from silicosis in cases in which the workman's disability results within 2 years after the last injurious exposure to silica dust. However, it contains an exception to the 2 year requirement between exposure and disability. If the employee, while continuously employed by the same employer is transferred from an injurious exposure to a non-injurious exposure and disablement occurs at any time during such employment with the same employer, or within 2 years after termination of such employment, the employer is liable for the payments prescribed by the Workmen's Compensation Law.

The provisions of Workmen's Compensation Law § 44-a as they read prior to July 1, 1957, constitute a statute of limitations on the right of a workman who contracted silicosis in his employment with the employer. It can not be disputed that if the workman became disabled within the 2 year period specified in the statute, he could prosecute his claim for compensation.

The amendment to Workmen's Compensation Law § 44-a (L. 1957, ch. 938) which is the subject matter of this appeal, did not create a new right or a new cause of action where none existed before, as alleged by the appellant (Jurisdictional Statement, p. 9).

As pointed out in the decision of the New York Supreme Court, Appellate Division, Third Department, it long has been recognized by law that the contraction of silicosis in a workman's employment constituted a "wrong" (*Barrencotto* v. *Cocker Saw Company, Inc.*, 266 N. Y. 139 [1934]). Moreover, as early as 1935, silicosis became a compensable disease under the Workmen's Compensation Law by the addition of § 3, subd. 2, par. 28, to that law. That paragraph brought in "Any and all occupational diseases" within the coverage of the statute (*Matter of Kazia* v. *Woodcrest Construction Co., et al.*, 282 App. Div. 880 [3rd Dept., 1953]).

It is true that when silicosis became compensable in 1935, the right to claim compensation in silicosis cases was subject to the limitations contained in Workmen's Compensation Law § 40, that the disease must have been contracted within 12 months previous to the date of disablement. However, the limitation itself merely constituted a statute of limitations on the right of workmen to claim compensation for disablement due to silicosis.

In 1936 (L. 1936, ch. 887), silicosis was excluded from the general occupational disease coverage under Workmen's Compensation Law § 3, subd. 2, par. 28, and it was made the subject of a new article numbered Article 4-A. By L. 1947, ch. 431, silicosis again was brought within the general occupational disease coverage subject, however, to the 2 year limitation between last injurious exposure and disablement contained in § 44-a and to certain other limitations not applicable here.

The 2 year limitation contained in § 44-a merely was a statute of limitations which could be changed or even lifted entirely at any time by the New York State Legislature.

Moreover, the policy of New York State which specified that in silicosis cases disablement must occur within 2 years after the last injurious exposure to silica dust, did not give the appellant a constitutional right against a change in that policy during and before a final adjudication of the claim for compensation.

The amendment to § 44-a was similar to the Minnesota statute which lifted the bar of a statute of limitations in a case in which litigation was pending. This Court upheld the constitutionality of the statute under attack and held that it was not violative of the Fourteenth Amendment of the United States Constitution (*Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304 [1945]).

Furthermore, even assuming without admitting that the amendment to Workmen's Compensation Law § 44-a (L. 1957, ch. 938), created a new "cause of action" as alleged by appellant (Jurisdictional Statement, p. 9), it is not thereby rendered unconstitutional (*Jacobus* v. *Colgate*, 217 N. Y. 235, 242 [1916]; *Jackson* v. *State of New York*, 261 N. Y. 134, 139 [1933]).

It long has been an accepted principle that the Workmen's Compensation Law is a remedial statute which was enacted for the promotion of the public good (*Matter of Petrie*, 215 N. Y. 335 [1915]; *Matter of Schmidt* v. *Wolf Contracting Co., Inc.*, 269 App. Div. 201 [3rd Dept., 1945], aff'd 295 N. Y. 748 [1946]).

When, following the decision in *Matter of Gazewski* v. *American Radiator & Standard Sanitary Corporation*, *supra*, the New York State Legislature became cognizant of the imperfections in the Workmen's Compensation Law in relation to silicosis cases, it amended § 44-a thereof for the promotion of the public good.

It long has been firmly established that neither property rights nor contract rights are absolute. They both are subject to the police power of the State which may enact laws which are reasonably necessary to secure the general

welfare of the community. The police power may be exercised to effect the due process of law clause as well as other clauses of the Federal Constitution (*Nebbia* v. *New York*, 291 U. S. 502 [1934]; *Queenside Hills Security Co., Inc.* v. *Saxl*, 328 U. S. 80, 82, 83 [1946]; *Veix* v. *Sixth Ward Building & Loan Association*, 310 U. S. 32, 40 [1940]; *Atlantic Coast Line Railroad Company* v. *City of Goldsboro*, 232 U. S. 548, 558, 559 [1914]; *People ex rel. Durham Realty Corp.* v. *LaFetra*, 230 N. Y. 429 [1921]; *Home Building & Loan Association* v. *Blaisdell*, 290 U. S. 398 [1934]).

Laws passed in the exercise of police powers which tend toward preservation of public safety or the lives, health and morals of our inhabitants and to the welfare of the community are constitutional and a law reasonably related and applied to a demonstrated evil, not arbitrary or discriminatory, satisfies the demands of due process (*Nebbia* v. *New York*, *supra*).

In dealing with employer-employee relations, the Legislature necessarily possesses a broad field of discretion in order that adequate protection of health and safety be maintained and that peace and order be promoted through laws designed to guarantee sound and wholesome conditions of work (*Chicago, Burlington & Quincy R. R. Co.* v. *McGuire*, 219 U. S. 549 [1911]; *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 [1937]).

The appellant's suggestion (Jurisdictional Statement, pp. 10, 11) that under the circumstances of the case at bar it has been singled out for liability to which other employers may not be exposed, is not material. Every classification of persons or things produces inequality in some degree but the law is not thereby rendered invalid unless the inequality produced be palpably unreasonable and arbitrary (*Arkansas Natural Gas Company* v. *Arkansas Railroad Commission*, 261 U. S. 379, 384 [1923]), nor are the provisions of a statute or the application thereof unconstitutional because it might seem that they inflict hard-

ship in a particular instance (*Bayside Fish Flour Co. v. Gentry*, 297 U. S. 422, 428 [1936]).

Despite the allegation of the appellant (Jurisdictional Statement, pp. 6, 11, 12), the reason why the case at bar was pending on July 1, 1957, the effective date of the amendment to Workmen's Compensation Law § 44-a (L. 1957, ch. 938), is not important. The significant fact is that the case was pending. However, as pointed out in the decision of the New York Supreme Court, Appellate Division, Third Department, there was nothing in the record on appeal to indicate that the appellant attempted to dispose of the case by perfecting the appeals which it had taken from the decisions of the Workmen's Compensation Board (fols. 177, 178). Under the circumstances, the appellant's complaint that the case was pending on the effective date of the amendment is not meritorious.

CONCLUSION

The jurisdictional statement of the appellant presents no substantial federal question to warrant a review by this Court of the order below. Hence, the appeal should be dismissed or the order affirmed.

Dated: New York, N. Y., November 28, 1960.

Respectfully submitted,

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APPENDIX A

Pertinent Statutes

§ 40. TIME LIMIT. Neither the employee nor his dependents shall be entitled to compensation for disability or death resulting from disease unless the disease is due to the nature of his employment and contracted therein, or in a continuous employment similar to the one in which he was engaged at the time of his disablement, within the twelve months previous to the date of disablement, whether under one or more employers. The time limit for contraction of the disease prescribed by this section shall not bar compensation in the case of an employee who contracted the disease in the same employment with the same employer by whom he was employed at the time of his disablement and who had continued in the same employment with the same employer from the time of contracting the disease up to the time of his disablement thereby; * * *

APPENDIX B

New York State Joint Legislative Committee on Industrial and Labor Conditions Report

SILICOSIS, LIABILITY, TIME LIMIT A. I. 3685, PR. 3827, SHERWIN CH. 938.

Workmen's Compensation Law, § 44-a.

In 1944, the Legislature passed Section 44-a of the Workmen's Compensation Law which extended the time to file for claims due to silicosis, as an occupational disease, from one year to two years after the last exposure. The intent of this section was to recognize that silicosis was, at least in some measure, a "slow starting disease" and that the disability resulting therefrom might become manifest within a period of two years, rather than one year, after the

employee was removed from the disease-causing environment.

Representatives of labor have informed the Committee that the two-year provision in section 44-a does not meet with the best interests of labor because silicosis is, in their opinion, so slow-starting that it may result in disablement long after the termination of such a limited period. It is labor's contention that the removal of an employee from a dust hazard area of employment to one of non-hazardous nature should not absolve an employer from responsibility for the onset of an active disease which results from conditions of earlier employment.

Up until December 23, 1955, labor generally believed that section 40 applied to silicosis as well as other slow-starting diseases. However, a decision of the Appellate Division in the matter of *Gajewski* ruled that the provision of continuous employment found in section 40 does not apply to silicosis and that, therefore, the "disablement" must occur within two years of the date of last exposure, and a claim filed thereon.

Because of this court decision, labor representatives urged that legislative action be taken to avoid a repetition of such conditions as were involved in the *Gajewski* case. Industry representatives, on the other hand, made equally strong pleas that there was no need for the modification of the occupational disease provisions of the Workmen's Compensation Law relating to silicosis because the conditions revolving around the *Gajewski* case were unusual and not normally duplicated.

The report of the Committee filed with the Legislature in 1956 (Leg. Doc. No. 55) made reference to the need for further exploration of silicosis and other related occupational diseases, including loss of hearing. It proposed to convene a summer conference during 1956 for the purpose of developing information which would lead to such con-

structive legislative actions as would achieve the mutual approval of interested parties. This conference was held in conformity with plans.

Agreement was reached, at least on a provisional basis, that an amendment to section 44-a be drafted for the purpose of protecting dust-affected employees beyond the two-year limit, while they are still in the employ of the company where the original exposure occurred and for a two-year period following the termination of employment with such company.

On the basis that this type of amendment would at least partially solve the phases of silicosis with which the Committee has been concerned, without undue effect on employers, the Committee has introduced this bill.

The amendment provides that where the employee remains continuously employed by the same employer and is transferred from an injurious exposure to a non-injurious exposure, he would be protected under the Workmen's Compensation Law for any period of time during which such employment with the same employer continues; and within two years of termination of such employment, over and above the other provisions now contained in section 44-a.

This measure will correct one phase of the silicosis and dust disease problem which has been in contention between industry and labor for the past two years.